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No. 95-712

# In the Supreme Court of the United States

OCTOBER TERM, 1995

LASALLE BANK LAKE VIEW, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether the bankruptcy court has jurisdiction, on remand from the district court, to adjudicate a controversy between creditors that arose during the bankruptcy case and that was on appeal to the district court when the bankruptcy court dismissed the bankruptcy case.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-12) is reported at 60 F.3d 1286. The opinion of the district court (Pet. App. 35-43) is reported at 166 B.R. 322. The opinion of the bankruptcy court (Pet. App. 32-34) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 2, 1995. The petition for a writ of certiorari was filed on October 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. In 1990, Statistical Tabulating Corporation, Inc. (the debtor) commenced a Chapter 11 bankruptcy proceeding. Petitioner and the United States had competing liens in the debtor's property. The bankruptcy proceedings led to the liquidation and distribution of the debtor's assets to its creditors. In the course of those proceedings, petitioner obtained an order from the bankruptcy court for the turnover of approximately $730,000 from the sale of various assets of the debtor (Pet. App. 2, 16-18). That order, however, had been entered improperly because the United States had not been given valid notice and had not appeared to contest entry of the order (*id.* at 2).

The United States filed a timely appeal upon learning of the entry of the turnover order. While that appeal was pending in the district court, the liquidation of the debtor proceeded to conclusion. The remaining proceeds of the liquidation were distributed primarily to petitioner as the principal creditor. On January 14, 1992, petitioner obtained an order from the bankruptcy court dismissing the debtor's bankruptcy case (Pet. App. 2-3, 13-15).

2. A few months later, on the government's appeal from the turnover order, the district court entered an order that (Pet. App. 25):

> vacate[d] the bankruptcy court's order disbursing the sales proceeds, order[ed] the Bank to properly serve its motion on the Government and direct-[ed] the bankruptcy court to consider whether its previous disbursement order gave the Bank a greater security interest in the debtor's property than was due * * *

The district court remanded the case to the bankruptcy court for further proceedings in accordance with the district court's opinion (*id.* at 30).

On remand, the bankruptcy court declined to follow the mandate of the district court. The bankruptcy court reasoned that, because that court had dismissed the debtor's bankruptcy case, the bankruptcy court no longer had jurisdiction over the merits of its prior turnover decreee (Pet. App. 31-34). On appeal from that ruling, the district court adopted the rationale of the bankruptcy court and held that the dismissal of the bankruptcy case deprived the bankruptcy court of further jurisdiction (*id.* at 35-43).

3. The court of appeals reversed (Pet. App. 1-12). The court rejected petitioner's contention that a dismissal of the bankruptcy case deprives the bankruptcy court of jurisdiction to address issues that were "pending on appeal in the district court" at the time the bankruptcy court entered its order dismissing the case (*id.* at 5). The court noted that an appeal divests the bankruptcy court of jurisdiction over the matter on appeal (*id.* at 7) and that, "[h]aving lost jurisdiction over the matter on appeal, the bankruptcy court did not have power to dismiss the portion of the case that was on appeal. Nor did the bankruptcy court need to 'retain' jurisdiction over the case in order to be able to assert jurisdiction once the case was remanded" (*id.* at 8). The court concluded that, because the controversy on appeal had not become moot, the bankruptcy court "should have accepted the mandate of the district court" and reconsidered the unlawfully entered turnover order (*ibid.*).

In a concurring opinion, Judge Garza reached the same conclusion by a different route. He reasoned that the bankruptcy court should have discretion

whether to exercise jurisdiction in these circumstances. He agreed, however, with the disposition of this case by the majority because, on the facts of this case, the factors relating to the exercise of such discretion "support the continuation of jurisdiction" (Pet. App. 12).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly noted (Pet. App. 2-3 n.1) that the controversy between petitioner and the United States concerning the correct distribution of the debtor's assets arose out of the underlying bankruptcy proceeding. When the erroneous turnover order entered by the bankruptcy court was appealed to the district court during the pendency of the bankruptcy case, jurisdiction over that matter vested in the district court in its role as an appellate court. The lower court then lacked authority to take action to deprive the appellate court of its jurisdiction (*id.* at 8):

> Having lost jurisdiction over the matter on appeal, the bankruptcy court did not have the power to dismiss the portion of the case that was on appeal.

As the court of appeals concluded, the provisions of the Bankruptcy Code that detail the effect of a dismissal of a bankruptcy case (11 U.S.C. 349) cannot be construed to permit "a bankruptcy court [to] deprive a district court of jurisdiction over an appeal by simply dismissing the underlying bankruptcy"

(Pet. App. 7).[1] As petitioner ultimately acknowledges (Pet. 18), there is ample precedent for the conclusion that a bankruptcy court retains jurisdiction to adjudicate unresolved matters that are related to the bankruptcy even after dismissal of the bankruptcy case in chief. See, *e.g.*, *In re Porges*, 44 F.3d 159 (2d Cir. 1995); *In re Querner*, 7 F.3d 1199, 1201-1202 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531, 1533-1534 (11th Cir. 1992); *In re Carraher*, 971 F.2d 327, 328 (9th Cir. 1992); *In re Smith*, 866 F.2d 576, 579-580 (3d Cir. 1989).

2. Petitioner errs in contending that the decision in this case conflicts with decisions of other courts of appeals.

a. Petitioner contends that the Ninth Circuit has held that "the dismissal of a bankruptcy case removes any power from the bankruptcy court to reopen it" (Pet. 16, citing *In re Income Property Builders, Inc.*, 699 F.2d 963, 964 (9th Cir. 1983)).[2] That contention is not correct.

The issue on appeal in *In re Income Property Builders, Inc.* was whether, during the bankruptcy

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[1] The court noted that petitioner did not, in any event, properly invoke 11 U.S.C. 349, because that statute provides that a dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case" (Pet. App. 4-5). Petitioner, however, was attempting to urge the dismissal as a basis for retaining the property of the estate that petitioner obtained through the invalid turnover order (*id.* at 5).

[2] Petitoner also cites (Pet. 17) two bankruptcy court decisions (*In re Woodhaven, Ltd.*, 139 B.R. 745 (Bankr. N.D. Ala. 1992), and *In re Garcia*, 115 B.R. 169 (Bankr. N.D. Ind. 1990)). Neither of those cases involved whether the bankruptcy court has jurisdiction to adjudicate matters on remand from appellate proceedings that were pending on the date that the bankruptcy case was dismissed.

case, the bankruptcy court had properly lifted the automatic stay provided by 11 U.S.C. 362. The question whether the automatic stay remained in effect was, of course, entirely dependent on whether the bankruptcy case continued in existence. The court of appeals concluded in *In re Income Property Builders, Inc.* that, because the bankruptcy case had been dismissed during the pendency of the appeal, the controversy regarding the lifting of the automatic stay must be dismissed "as moot." 699 F.2d at 964.

In the present case, by contrast, the court of appeals correctly observed that "a live controversy still existed between two creditors when the bankruptcy court dismissed the underlying bankruptcy. The dismissal did not fully resolve or otherwise moot the issue on appeal" (Pet. App. 8). Nothing in *In re Income Property Builders, Inc.* conflicts with that conclusion.

b. Petitioner further contends (Pet. 18-19) that, in holding that the bankruptcy court must comply with the mandate of the district court to redetermine an order that the district court vacated on appeal, the decision in this case conflicts with decisions holding that the bankruptcy court has *discretion* whether to retain jurisdiction of pending matters following the dismissal of the underlying bankruptcy case. But the decisions that petitioner cites (Pet. 18)—*In re Porges*, 44 F.3d 159 (2d Cir. 1995); *In re Querner*, 7 F.3d 1199 (5th Cir. 1993); *In re Morris*, 950 F.2d 1531 (11th Cir. 1992); *In re Carraher*, 971 F.2d 327 (9th Cir. 1992); and *In re Smith*, 866 F.2d 576 (3d Cir. 1989)—do not involve orders relating to the distribution of property that were vacated in appellate proceedings that were pending at the time the bankruptcy court dismissed the bankruptcy case. None of the cases

cited by petitioner thus considers or addresses whether the bankruptcy court would have discretion to decline to exercise jurisdiction over a matter remanded by the district court upon the conclusion of a timely appeal.

Moreover, as the concurring opinion of Judge Garza reflects, even if the bankruptcy court were thought to have discretion in these circumstances, the factors that relate to the exercise of that discretion would require the conclusion that such jurisdiction must be exercised (Pet. App. 12). Under either the majority or concurring views, the result on the facts of this case is thus the same—the bankruptcy court must exercise jurisdiction to reconsider its invalid turnover order on remand from an appellate proceeding that was pending when the bankruptcy court dismissed the bankruptcy case. Further review of the decision in this case is thus not warranted for the additional reason that resolution of the claimed conflict would not alter the ultimate disposition of the case. See *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) ("our power is to correct wrong judgments, not to revise opinions").

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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